Supreme
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9771

ACCURACY IN MEDIA, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitionier, Accuracy In Media, Inc. (AIM), respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on October 16, 1975.

OPINIONS BELOW

The Memorandum Opinion and Order of the Federal Communications Commission (Commission or FCC) is reported at 43 F.C.C.2d 851 (1973), and is reprinted in the appendix to

this petition (App., p. 1a). The opinion and judgment of the Court of Appeals, review of which is sought, is reported at 521 F.2d 288 (App., p. 15a).

JURISDICTION

The judgment and order of the Court of Appeals was entered on October 16, 1975. This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the FCC has jurisdiction to enforce Section 396(g)(1)(A) of the Communications Act of 1934 against the Corporation for Public Broadcasting?

2. Whether the decision of the Court of Appeals affirming the Commission's decision to reject jurisdiction over the Corporation for Public Broadcasting is in direct conflict with the provisions and legislative intent of the Communications Act of 1934?

3. Whether the decision of the Court of Appeals is in conflict with the principles of broadcast regulation established by this Court in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968); and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28: § 2342(1)

Jurisdiction of Court of Appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of–

(1) all final orders of the Federal Communications Commission made reviewable by section 402 (1) of title 47;

United States Code, Title 47: § 151

Purposes of Act; Creation of Federal Communications Commission

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

United States Code, Title 47: § 312(b)

Administrative Sanctions

(b) Where any person (1) has failed to operate substantially as set forth in a license, or (2) has violated or failed to observe any of the provisions of this Act, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

United States Code, Title 47: § 396(g)(1)(A)

Purposes and Activities of the Corporation

(1) In order to achieve the objectives and to carry out the purposes of this subpart [this section], as set out in subsection (a), the Corporation is authorized to–

> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

United States Code, Title 47: § 398

Federal Interference or Control Prohibited

Nothing contained in this part [47 USC §§ 390-399] shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

STATEMENT OF THE CASE

On October 16 and November 20, 1971, Petitioner (AIM) filed two complaints with the FCC alleging that two programs funded by the Corporation for Public Broadcasting (hereinafter Corporation, or CPB), and distributed by the Public Broadcasting Service (PBS), violated both the Fairness Doctrine and the "objectivity and balance" standard mandated by Section 396 (g)(1)(A) of the Communications Act of 1934 (Act).

The FCC, by a letter ruling dated January 23, 1973 (reported

at 39 FCC 2d 416) ruled that the Fairness Doctrine had not been violated. The Commission did not, however, determine whether the programs were in compliance with Section 396 (g)(1)(A) of the Act. It stated that this determination was a matter of "considerable doubt, particularly in light of the caution in Section 398 [of the Act]" which provides, among other things, that nothing contained in Sections 390 through 399 shall be deemed to authorize any agency of the United States to exercise "direction, supervision, or control" over educational television broadcasting or over the Corporation. The Commission invited comments from interested parties as to its authority to enforce the standards contained in Section 396 (g)(1)(A) of the Act (39 F.C.C.2d 416, 420 & n.1).

Additional submissions were made to the Commission, as requested, by Petitioner and others, on the question of whether the Commission had jurisdiction to "reach a separate conclusion under Section 396 (g)(1)(A)."

On November 15, 1973, the Commission ruled that it did not have jurisdiction to enforce the provisions of Section 396 (g)(1)(A) of the Act inasmuch as it was precluded from doing so by the provisions of Section 398 of the Act (43 F.C.C.2d 851).

FCC Commission Wiley filed a concurring opinion; Commissioner Hooks dissented.

Pursuant to 28 U.S.C. 2342(1), Petitioner appealed the Commission's decision to the Court of Appeals for the District of Columbia Circuit. The Corporation for Public Broadcasting, the Public Broadcast Service, the University of Maine, and other parties, were permitted to intervene. The case was argued on April 14, 1975; the decision of the court below was entered on October 16, 1975. The decision of the FCC was affirmed. For "essentially the same reasons advanced by the Commission," the Court of Appeals concluded that the FCC does not have jurisdiction to enforce the mandate of Section 396 (g)(1)(A) against the CPB (521 F.2d 288, 291).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in direct conflict with the provisions and clear legislative intent of Section 396 (g)(1)(A) of the Communications Act of 1934, as amended.

The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. This is the first case involving an interpretation of Section 396 (g)(1)(A) of the Communications Act. It is also, so far as Petitioner is aware, the first case which raises the issue of the legal accountability of the Corporation for Public Broadcasting for compliance with the Public Broadcasting Act of 1967.

The decision below, moreover, is in conflict with the principles of broadcast regulation established by this Court in *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968); and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 369 (1969).

I. The Court of Appeals's Decision is in Direct Conflict with the Provisions and Clear Legislative Intent of Section 396 (g)(1)(A) of the Communications Act.

Section 396 was added to the Communications Act by the Public Broadcasting Act of 1967. It is this section which creates the Corporation for Public Broadcasting and delineates its powers and functions. The various subsections of section 396, among other things, authorize the establishment of the Corporation (§ 396(b)), specify the method for the selection of its board of directors (§ 396(c)(1)), prohibit the Corporation from contributing to or otherwise supporting any political party or candidate for public office (§ 396(f)(3)), and qualify the Corporation's authorization to fund programming activities (§ 396(g)(1)(A)).

It was one of the contentions of Petitioner when it originally brought its two complaints to the FCC that the Corporation had not complied with the mandate of Section 396 (g)(1)(A) with respect to the programs in question. The central activity of the Corporation is the support of programming; this is carried out, in large part, with public funds appropriated to CPB. The Congress quite properly circumscribed the authority of the Corporation to support programming activities, a fact which the court below seems to concede in its opinion:

> Section 396 (g)(1)(A) is part of the Public Broadcasting Act of 1967, an act which created the Corporation for Public Broadcasting (CPB) and authorized it to fund various programming activities. . . . *Section 396 (g)(1)(A) qualifies that authorization in the following language:*
>
> > In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to–
> >
> > (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, *with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.* (521 F.2d at 290, emphasis supplied)

Having specifically described the Corporation's authorization to support controversial issue programming, it is Petitioner's contention that the Congress–by necessary inference–has prohibited the CPB from supporting such programming which fails to meet the "objectivity and balance" standard. The legislative history of Section 396 (g)(1)(A) makes this Congressional intent abundantly clear (see below). The Court of Appeals seems to have conceeded this point as well:

> Since [Section 396 (g)(1)(A)] is clearly directed to the Corporation and its programming activities, we have no doubt that the Corporation must respect the mandate of the Section. (521 F.2d at 292)

The Court of Appeals then went on, however, to nullify the regulatory enforceability of the Section:

> [W]e conclude that nothing in the language and legislative history of the Federal Communications Act or the Public Broadcasting Act of 1967 authorizes the FCC to enforce that mandate against the CPB. (Id.)

Elsewhere in its opinion, the court below refers to the section as containing "hortatory language," (521 F.2d at 297). The Court of Appeals has thus dealt with the section as though it were something in the nature of a Congressional suggestion rather than an amendment to the Communications Act of 1934. Long established principles of statutory construction, and the legislative history of Section 396 (g)(1)(A) preclude such an interpretation.

It is significant that, in its discussion of the legislative history of Section 396 (g)(1)(A), the Court of Appeals failed to refer to or quote from the single most relevant portion of that legislative history, the Conference Report which specifically discussed the section. The Report (H.Rept. No. 794, 90th Cong., 1st sess.) reflects the considered legislative intent that the Section is to be an enforceable obligation of the Corporation:

> These provisions [which prohibit editorializing and support or opposition for political candidates] are consistent with the *requirements* of section 396 (g)(1)(A) of the Communications Act of 1934 (which would be added by the conference substitute) which *require* that programs or series of programs of a controversial nature which are made available to the Public Broadcasting Corporation

> *must adhere strictly* to objectivity and balance. (page 12, emphasis supplied)

* * * * * *

> Under both the Senate bill and the House amendment the Public Broadcasting Corporation is authorized to "facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television and radio stations". The House amendment provides, in addition, that in the case of programs of a controversial nature there must be strict adherence to objectivity and balance. The conference substitute adopts these provisions of the House amendment with a modification so as to make the requirement more flexible. As so modified each program in a series need not meet the test of objectivity and balance, but the series, when considered as a whole, must. (page 13)

A further indication of the legislative intent that Section 396 (g)(1)(A), and indeed Section 396 in its entirety, be enforceable against CPB is the fact that the Congress deliberately chose to create the Corporation, and to define its authority, as an integral part of the pre-existing regulatory structure embodied in the Communications Act. As a result, Commission enforcement is required by the unequivocal language of Section 1 of the Act (47 U.S.C. §151), which established the FCC and provided that it "shall execute and enforce the provisions of this chapter." Similarly, Section 312(b) of the Act authorizes the FCC to issue cease and desist orders to "any person" who "has violated or failed to observe any of the provisions of this chapter."

There is nothing in the language of Section 396, which created the Corporation and placed limitations on its authority, or in the legislative history, to suggest that the Congress intended Section 396, or any subsection thereof, to be exempt from the

overall effect of Sections 151 and 312, which, by their express terms, apply to all provisions of the Act. On the Contrary, Congress stated in Section 398 of the Act:

> Nothing contained in sections 390-399 of this title shall be deemed . . . to amend any other provision of, or requirement under this chapter. (47 U.S.C. 398)

Furthermore, subsection (b) of Section 396—which created the CPB—clearly states that the Corporation "shall be subject to the provisions of this section," (47 U.S.C. 396(b)).

In the decisions below, both the FCC and the Court of Appeals seized upon certain language of Section 398 of the Act as relieving the Commission of jurisdiction to enforce Section 396 (g)(1)(A). Section 398 reads as follows:

> Nothing contained in sections 390-399 of this title shall be deemed (1) to amend any other provision of, or requirement under this chapter; or (2) to authorize any department agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television broadcasting, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system. (47 U.S.C. 398)

The Court of Appeals reasoned as follows:

> Since the FCC is obviously an "agency . . . of the United States" and since any enforcement of § 396(g)(1)(A) would necessarily entail "supervision" of the Corporation, the plain words of subsection (2) preclude FCC jurisdiction. (521 F.2d at 292)

Petitioner notes preliminarily that Section 398 refers only to "sections 390-399 of this title", and that FCC jurisdiction is independently conferred by sections 151 and 312(b) of the Act, which section 398 by its express terms does not amend.

But the Court of Appeals has fallen into a more basic error. The caution against "direction, supervision, or control" contained in Section 398 does not relate solely to the Corporation for Public Broadcasting. That language is also made to apply to "educational television broadcasting" in general, and to others as well. Therefore, if Section 398 is held to "preclude FCC jurisdiction" to enforce Sections 390 through 399 with respect to the CPB, it must logically be held to have the same effect with respect to "educational television broadcasting" in general, including individual noncommercial broadcasting stations.

But Section 399 expressly provides that the FCC shall enforce its provisions, which, among other things, prohibit noncommercial educational broadcasting stations from editorializing or supporting political candidates. Noting this, the Court of Appeals asserted that Section 399 of the Act is "contrary" to Section 398 of the Act:

> Section 399 of the 1967 Act . . . is contrary to the § 398 prohibition in that it mandates "supervision" of noncommercial licenses and contemplates FCC enforcement. (521 F.2d at 292)

Petitioner submits that the Court of Appeals has erroneously equated regulatory enforcement of a validly enacted statute, Section 396 (g)(1)(A), with "direction, supervision, or control" as those terms are used in Section 398. This departure from prudent statutory construction has led the court below to attribute internal inconsistencies to Sections 398 and Sections 396 (g)(1)(A), 399, 151, and 312(b) of the Communications Act. In his dissent from the FCC's decision of November 15, 1973, FCC Commissioner Hooks correctly stated:

[T]he inescapable language of the Communications Act empowers the Commission to "execute and enforce the provisions of this Act", of which Section 396 *et seq.* is an incorporated part. If there is a patent ambiguity arising out of the language of Section 398, the ambiguity should be resolved along the customarily prudent rules of statutory construction; *viz*, in *pari materia* with the entire Communications Act (and the comprehensive regulatory scheme established thereby) with preponderant attention to the unequivocal edict of Section 1 of the Act that the Commission "administer and enforce" the Act, Section 396 included. And, unless it is assumed that it is the primary purpose of Congressional law to disrupt and confound the activities of the populace, it cannot be reasonably argued that administration and enforcement of a duly adopted statute (Section 396, for example) is the type of "interference" intendedly proscribed by Section 398; the proposition that equitable administration of federal law is coextensive with "direction, supervision or control" (47 U.S.C. §398) is, on its face, uniquely cynical. Hence, I find the apparent conflict between Sections 1 and 398 of the Communications Act illusory rather than real and our administration of those portions of the Act pertaining to CPB wholly consistent with law. (Dissenting statement of FCC Commissioner Hooks, footnotes omitted. See App. p 10a.)

As interpreted by the FCC and the Court of Appeals, Section 396 (g)(1)(A) of the Communications Act has been deprived of its status as enacted law entitled to regulatory enforcement. It has been transformed into a mere "hortatory" formula (521 F.2d at 297). Moreover, the decisions below jeopardize the other sensitive subsections of Section 396, which carefully circumscribe the permissible limit of CPB activities. As a result, the public will have no administrative forum in which to call the Corporation to account.

In the case of *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C.Cir. 1966), the decision of Judge Burger, now Chief Justice of this Court, quoted with approval from a report of the House Committee on Interstate and Foreign Commerce, as follows:

> Under our system, the interests of the public are dominant. . . . *Hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of the television service* which stations and networks provide and which, undoubtedly, has a *vast impact on their lives and the lives of their children.* Nor need the public feel that in taking a hand in broadcasting they are unduly interfering in the private business affairs of others. On the contrary, *their interest in television programming is direct* and their responsibilities important. *They are the owners* of the channels of television—indeed, of all broadcasting. (359 F.2d at 1003; emphasis in original)

The above principles apply with at least equal force to the Corporation for Public Broadcasting whose activities involve not only the public airwaves but the public treasury as well.

In his concurring opinion in the case of *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) Mr. Justice Douglas commented on the unique status of the Corporation for Public Broadcasting, distinguishing it from private broadcast licensees:

> Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation.
>
> Congress has authorized the creation of the Corporation for Public Broadcasting, whose Board of Directors is appointed by the President by and with the advice and

consent of the Senate. 47 U.S.C. §396. . . . It is a non-profit organization and by the terms of §396(b) is said not to be "an agency or establishment of the United States Government." Yet, since it is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment. If these cases involved that Corporation, we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the New York Times, Washington Post, and Sacramento Bee. The government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs. (412 U.S. at 149)

It was, in fact, the clear and obvious legislative intent of the Congress in creating the Corporation that "politics, ideological slants, rightist or leftist tendencies" would play no part in its design or support of programs. It was for this reason that the Congress provided, in Section 396 (g)(1)(A), that the Corporation's programming activities must strictly adhere to "objectivity and balance in all programs or series of programs of a controversial nature."

It is clear that the Court of Appeals was hostile to the Congressional limitation placed on the authorization given to the CPB to support controversial issue programming. The constitutionality of Section 396 (g)(1)(A) is not at issue in this proceeding; the Court of appeals, however, concluded its decision with a lengthy discussion of its "constitutional misgivings" concerning the section (521 F.2d at 297).

Petitioner recognizes that the interpretation and application

of Section 396 (g)(1)(A) might well raise constitutional issues, and is prepared to defend the constitutionality of the section. The Petitioner's complaints against CPB, insofar as they were based on Section 396 (g)(1)(A), have been circumvented by the erroneous decisions below. These decisions have held that the Congress did not intend the FCC to have jurisdiction to enforce the section, notwithstanding its deliberate incorporation into the Communications Act of 1934, whose provisions the Commission is directed to "execute and enforce" (47 U.S.C. 151). The result has been to prevent the statute from being applied and tested through the appropriate administrative and judicial processes.

II. The Court of Appeals' Decision is in Conflict with the Principles of Broadcast Regulation Established by This Court in *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968); and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 369 (1969).

From its inception in the Radio Act of 1927, broadcast regulation in the United States has been entrusted to an expert bipartisan and independent Commission. The Senate Report which accompanied the bill that became the Radio Act of 1927 (44 Stat. 1162) stated:

> [Y]our committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission, granting it full and complete authority over the entire subject of radio. (S.Rep. 772, 69th Cong., 1st sess., p.3)

The Communications Act of 1934, which replaced the Radio Act, has retained the principle embodied in the above-quoted language. Central to the whole scheme of broadcast regulation is the "public interest, convenience, or necessity" standard contained in Section 307 of the Act (47 U.S.C. 307). This Court

has stated that the standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), at page 138. Like Section 307, Section 396 (g)(1)(A) of the Act is not self-defining. It has been the consistent position of this Court, however, that the interpretation and application of the provisions of the Communications Act are "explicitly and by implication left to the Commission's own devising," and that the Commission is "the expert body which Congress has charged to carry out its legislative policy." *Pottsville, supra*, at p. 138.

That principle was reaffirmed by this Court in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), wherein this Court held that the FCC had jurisdiction over cable television despite the fact that such jurisdiction was not explicitly mentioned in the Act (see 392 U.S. at 172-73). In *Southwestern*, this Court reaffirmed the broad expanse of the FCC's jurisdictional responsibilities:

> The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given"broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." (citing *Pottsville, supra)*

Finally, in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), this Court upheld the Commission's authority to apply the Fairness Doctrine. The Court stated:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes

> of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . (395 U.S. at 390)

The legislative history of the Communications Act, and this Court's decisions over the years' have established the principle that the FCC is the chosen instrument by which Congress sought to obtain a cohesive, expert, and nonpartisan regulatory policy.

The decision of the Court of Appeals, however, would remove sensitive provisions of the Communications Act from the jurisdiction of the Commission. The decision of the Court of Appeals rests on the paradoxical assertion that the Congress intended to insure the "independence" of the CPB by itself exercising direct control over its operations:

> Ultimately, Congress may show its disapproval through the appropriation process. . . . Through these statutory requirements and control over the 'purse-strings,' Congress reserved for itself the oversight responsibility for the Corporation. (521 F.2d at 294)

Thus, despite this Court's holding in *Pottsville Broadcasting* that the FCC has the responsibility and jurisdiction, in the first instance at least, to interpret and apply the provisions of the Act, the Court of Appeals has held that certain provisions of the Act lie outside the Commission's jurisdiction. Despite the holding in *Southwestern Cable, supra*, that the FCC's jurisdiction is sufficiently unified and broad to reach an entity, cable television, not specifically mentioned in the Act, the Court of Appeals has held that the Commission's jurisdiction does not reach an entity, the Corporation for Public Broadcasting, specifically created by the Act. Despite the teaching of *Red Lion* that rights of the public are paramount, the public has been left without an administrative forum in which to call the CPB to account for violations of the Act.

If the decisions below are allowed to stand, sensitive regulatory issues concerning the programming sponsored by the CPB will not be addressed through the appropriate administrative and judicial review procedures mandated by the Congress. Such issues, if addressed at all, will be disposed of through the completely inappropriate Congressional appropriations process. Petitioner endorses the following observations of dissenting FCC Commissioner Hooks on these points:

> There are in the larger sense, however, other more compelling (if not more cogent) reasons why the Commission is the proper body to ensure CPB's compliance with the Communications Act. Inasmuch as it is obvious that *somebody* must administer those laws relating to CPB, it is my contention that the Commission, an independent, bi-partisan regulatory agency, whose members are appointed by the President with the advice and consent of the Senate, and whose actions are subject to established, reasonably expeditious review by the judicial and legislative branches of government, is the most appropriate entity to handle the task. In addition to the foregoing properties, the Commission—with all attendant faults and errors—executes the difficult and sensitive regulation of broadcasting on a day-to-day basis and, I believe, has evolved a better "feel" (for lack of a more precise characterization) for such matters than any other existing body.
>
> While I suppose that an aggrieved party could refer alleged violations of Section 396 to the Department of Justice for prosecution, that places the Executive Branch of government in "control of codified CPB activities. This not only leaves room, theoretically, for partisan application but limits the usefulness of the doctrine of primary jurisdiction of an adminstrative agency under which initial claims can receive thorough consideration.
>
> On the other hand with all due deference to the Senator who suggested that Congress could control CPB through its appropriations function, "purse-string" power is far from the most appropriate or effective manner of administering delicately etched law. . . . "Purse-string" power, especially in the case of multi-year appropriations, is likely to mean too little (or too much) too late; it lacks the flexibility required to fashion adequate resolutions and the public—whose funds and frequencies are involved—has no significant entree into Congressional budgetary proceedings while it is accustomed to, and regularly does, direct its inquiries and grievances about noncommercial broadcasting to the Commission, as witness the instant complaint. Consequently, abjuration in the instant matter has effectively deprived any complainant of a forum wherein the matter of possible violations can be thoroughly considered and adjudicated. To my way of thinking, that result is manifestly unsatisfactory. (Dissenting opinion of FCC Commissioner Hooks, See App. p. 10a.)

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Complaint of Accuracy in Media, Inc., on behalf of
Marilyn Desaulniers Concerning Fairness Doctrine
Re Public Broadcasting Service

43 FCC 2d 851 (1973)

Memorandum Opinion and Order

Adopted: November 13, 1973; Released: November 15, 1973

By the Commission: Commissioner Johnson concurring in the result;

Commissioner Wiley concurring and issuing a statement;
Commissioner Hooks dissenting and issuing a statement.

1. By letter of January 23, 1973 (39 FCC 2d 416), we ruled upon complaints filed by Accuracy in Media, Inc. (AIM) against the Public Broadcasting Service in which it was alleged that the broadcasts of programs entitled "the three r's . . . and sex education" and "Justice?" were in violation of the fairness doctrine (see 47 U.S.C. 315) and the provision of Section 396 (g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. 396 (g)(1)(A), that, "In order to achieve the objectives and to carry out the purposes of this subpart, as set out in section (a), the Corporation is authorized to–

> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncom-

mercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature; * * *"

Our letter ruling concluded that there was no basis for a finding of violation of the fairness doctrine. With respect to the issue of the applicability of Section 396, we noted that AIM had not given us the benefit of its views on the novel jurisdictional question it was presenting, and we invited AIM and other interested persons to brief that question separately.

2. Briefs or memoranda, including some replies, have now been submitted by AIM, the Corporation for Public Broadcasting, Horace P. Rowley, III, the Public Broadcasting Service and Daniel Voegtly. AIM has also sought reconsideration of our fairness doctrine ruling in the January 23, 1973 letter. The AIM request for reconsideration points out that it is the right of viewers and listeners to a fair presentation of issues which is paramount, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, and that the press and media "hold a powerful tool in their hands that can be used as a weapon in molding public opinion," but it does not present any suggestion of how the Commission may have erred in its original fairness doctrine ruling. The petition for reconsideration will therefore be denied.

3. The parties who have responded to our invitation for comments on our jurisdiction with respect to Section 396 (g)(1)(A) have taken widely divergent positions. AIM urges that Congress expected the Commission to take a positive, active role, and to require strict compliance by the Corporation for Public Broadcasting. Mr. Voegtly also believes that the Commission has a duty to enforce Section 396 (g)(1)(A), and that "balance is an extension of fairness to a more limited segment of programming," coupled with an effort to present each side of an issue "with similar force and credibility." The Corporation, however, urges not only that we lack jurisdiction over the operations of the

Corporation, which it asserts were intended to be free of governmental control and censorship, but that we should also "refrain from engaging in an indirect review of the Corporation's programming determinations" through application of the fairness doctrine to the programs of licensees funded, provided or distributed by the Corporation.[1] AIM disagrees in a reply pleading with the conclusion of the Corporation that Section 396(g)(1)(A) is an unenforceable Congressional mandate, urging that enforcement of that section is no more prohibited censorship than is the enforcement of Section 315. Horace P. Rowley, III states that Section 396 creates a more vigorous standard than we apply under the fairness doctrine, prohibiting editorializing and requiring equal opportunities within a program series for contrasting viewpoints on any "newsworthy" issue. However, while agreeing with the Corporation that the Commission has no control over what he terms the Corporation's internal activities, i.e., the expenditure of money for programs, he contends that the Corporation is a broadcaster and thus is

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[1] The Corporation states that the Commission should continue to review the operations of noncommercial stations in other respects, including instances in which a licensee may broadcast only a portion of a program on program series funded by the Corporation. In a subsequent pleading, which we accept, the Corporation clarified its position to make clear that the Commission should not review, even indirectly, the Corporation's programming determinations with respect to programs funded, supplied or distributed by the Corporation, because this would duplicate the Corporation's mandate to achieve fairness (stated by the Corporation to be one substantive test, whether denominated under the fairness doctrine or the objectivity and balance language of Section 396(g)(1)(A)), but that the Commission would continue to apply the Fairness Doctrine "the the overall program schedule of its licensees." The Corporation reads Section 396(g)(1)(A) as applying to individual programs or series and, thus, believes it improper for the Commission to apply the fairness doctrine to any program or series furnished by the Corporation, but proper for the Commission to review a licensee's overall treatment of an issue, including a program furnished by the Corporation. We presume that upon such review, the Commission would have to accept as given the fairness of the program furnished by the Corporation if it was the only program furnished by the Corporation on that issue.

subject to the fairness doctrine under Section 315. He has also furnished a copy of a letter to him from the General Accounting Office stating that that office has tentatively agreed not to concern itself with program selection or content although it has legal authority to do so. Finally, the Public Broadcasting Service, a non-profit membership corporation made up of noncommercial educational television stations which receive programming distributed by PBS and funded by the Corporation, contends that we should construe Section 396 as imposing no obligation different from that imposed upon licensees by the fairness doctrine, although it suggests that we may not have the authority to enforce the section against the Corporation.

4. As we noted in our letter of January 23, 1973, this is an area of considerable doubt, and the comments we have received, while forcefully advocating various viewpoints, have done little to dispel the doubt. The reason for this is clear. Congress in creating the Corporation for Public Broadcasting focussed largely on that body's structure and responsibilities, and paid scant attention to its relationship, if any, to this Commission. Thus, not only is the statute devoid of specific guidance, but the legislative history is similarly tangential. For the reasons which follow, we have determined that the Commission does not have the authority to enforce Section 396(g)(1)(A).

5. We note first that Section 398 of the Communications Act, 47 U.S.C. 398, provides that nothing contained in Part IV of the Act (the part dealing with grants for noncommercial educational broadcasting facilities (Subpart A) and the Corporation for Public Broadcasting (Subpart B, added by Public Law 90-129, approved November 7, 1967, 81 Stat. 368)):

> ". . . shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over

> the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station system."

This provision, we think, makes clear that the creation of the Corporation for Public Broadcasting by the Public Broadcasting Act of 1967 should not be construed as conferring regulatory or supervisory jurisdiction over that Corporation in the Commission unless some provision of the Act outside of Part IV either specifically confers such jurisdiction or requires it as a necessary part of the achievement of the Commission's functions. No other part of the statute refers in terms to the Corporation for Public Broadcasting, and an assertion of jurisdiction would necessarily rest upon the general mandate of Section 1, 47 U.S.C. 301, that the Commission "shall execute and enforce the provisions of this Act," and the authority in Section 312(b), 47 U.S.C. 312(b), to order "any person" to cease and desist from violating or failing to observe "any of the provisions of this Act." It is appropriate, in assessing the impact of these provisions, to take account of the facts that the Corporation not only does not operate licensed broadcasting facilities, but is not itself a network, compare *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470(C.A. 2, 1971), and does not own or operate any interconnection or program production facilities. Indeed, it is forbidden by law from engaging in such activities. See 47 U.S.C. 396(g)(3). It is not engaged in the interstate transmission of communications or energy by wire or radio. Compare *United States v. Southwestern Cable Co.*, 392 U.S. 157. In this setting of a Congressionally mandated separation from the normal context of regulatory jurisdiction, the generalized legislative history takes on added significance. That history is redolent of an intent to separate the Corporation from any outside control, specifically including government control. As Senator Pastore stated (113 Cong. Rec. 12986), "Throughout the hearings, universal determination has been expressed that the Corpora-

tion have maximum possible freedom from governmental or political interference and control." House Report No. 592, 90th Cong., 1st Sess., on H.R. 6736, p. 15, put it thusly:

> "How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.
>
> Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation directed by a Board of Directors, none of whom will be Government employees, will provide the most effective insulation from Government control or influence over the expenditure of funds."[2]

Again Congressman Staggers stated (113 Cong. Rec. 26384):

> "This bill, after recognizing the need for Federal funds to aid in the production of programs, then addressed itself to solving the problem of how to administer Federal funds for broadcast programs while, at the same time, avoiding Federal control of these programs.
>
> No one—the administration, the committee, the witnesses—wanted any hint of Federal control of broadcast programs to be permitted.
>
> Accordingly, the legislation calls for the formation of a separate nonprofit, private corporation to administer funds, both private and public, which will be used to provide high

[2] At p. 19, "one of the fundamental reasons for establishing the Corporation is to remove the programming activity from governmental supervision."

> quality programs to the local stations. At all times the local stations have the right to accept or reject any program. The Corporation cannot require that a station broadcast any program. As required under present law, and as will be required under the new law, the sole responsibility for what goes out over the air rests upon the individual station licensee. This bill, I repeat does not impair or affect the existing statutory duty and responsibility of the station licensee."

There is also some indication that Congress may have had in mind reserving to itself the general oversight of the operations of the Corporation. As Senator Cotton stated (113 Cong. Rec. 13003):

> "If this bill becomes law, as I hope it will and if, as time goes on, we have occasion to feel that there is a slanting, a bias, or an injustice, we instantly and immediately can do something about it. First, we can make very uncomfortable, and give a very unhappy experience to, the directors of the Corporation. Second, we can shut down some of their activities in the Appropriations Committee and in the appropriating process of Congress with respect to this particular network, if we wish to call it a network in the sense that it is general programming. The Corporation is much more readily accessible to the Senator from South Carolina, any other Senator, or to the Congress, if it desired to correct any injustice or bias which might appear."

6. In the light of the statutory language of Section 398, the clear, if unspecific, intent of Congress to keep the Corporation free of government control, and the detached position the Corporation itself was given with respect to the entire noncommercial educational broadcasting system, we are constrained to hold that we would not be warranted in attempting to oversee

the Corporation's execution of its duties.[3] Our view is reinforced by the consideration that the individual stations remain fully responsible for all programs they broadcast;[4] it is therefore unnecessary for us to add a further layer of fairness supervision to our present enforcement of the fairness doctrine with respect to licensees and, where appropriate, networks. This basic jurisdictional determination makes it inappropriate, in our view, for us to interpret for the guidance of the Corporation the meaning of the words "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature."

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Accuracy In Media, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ VINCENT J. MULLINS
Vincent J. Mullins
Secretary

*See attached statements of Commissioners Wiley and Hooks.

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[3] We also reject Mr. Rowley's view that the Corporation is a broadcaster amenable to Section 315 regulation.

[4] The legislative history leaves no doubt that local stations are to maintain full responsibility for all programming. See S. Rept. No. 222, 90th Cong., 1st Sess., on S. 1160, pp. 11, 14-15; H. Rept. No. 572, 90th Cong., 1st Sess., on H.R. 6736, pp. 18, 20; 113 Cong. Rec. 26384 (Congressman Staggers: "This bill, I repeat does not impair or affect the existing statutory duty and responsibility of the station licensee."). This being so, and in the light of the command of Section 398 that nothing in Part IV shall be deemed to amend any other provision or requirement of the Act, we reject the view of the Corporation that the fairness doctrine should not be applied with respect to programs funded, provided or distributed by the Corporation.

**Concurring Statement of Commissioner Richard E. Wiley
In Re Complaint of Accuracy in Media, Inc.,
on behalf of Marilyn Desaulniers Concerning Fairness
Doctrine Re Public Broadcasting Service.**

It has been suggested that this Commission should assert jurisdiction over the Corporation for Public Broadcasting (CPB) and, thereby, enforce the provisions of Section 396(g)(1)(A). In support of that suggestion, it is pointed out that the Communications Act gives us broad and expansive jurisdiction over all interstate and foreign radio communications, and that it is unreasonable to assume Congress intended to enact an unenforceable statute. When viewed only in this light, it may be argued with some persuasiveness that the Commission should proceed to enforce the requirements of Section 396 with no less vigor than any other portion of the Act. Regardless of whether we *should* assert such regulatory control, a position for which I have some personal sympathy, the simple answer is that we *cannot*.

Congress chose to delimit our otherwise expansive regulatory authority over broadcasting by expressly forbidding this agency from exercising any direction, supervision or control over noncommercial educational broadcasting or CPB (see Section 398). Thus, a clear regulatory distinction was drawn between Subpart B of the Act, which created a tax supported private corporation to develop educational radio and television, and the commercially supported broadcasting system covered elsewhere in the Act. The legislative history, no less than the express limitation of Section 398, indicate that Congress apparently intended to retain direct supervisory control over "public broadcasting," rather than delegate that responsibility to this or any other agency of government. While it may be unrealistic to expect that Congress will assert its prerogative to regulate the on-going activities of CPB, that uncertainty is no warrant for this Commission to arrogate to itself a measure of regulatory authority expressly forbidden by Section 398. The most per-

suasive argument that we should control the activities of CPB is inadequate in the face of an express provision that we cannot. An agency misconstrues the reach of its regulatory authority when it attempts to control by implication that which it has been denied explicitly. In the absence of Section 398, the assertion of administrative supervision over CPB can be reasonably supported; but that result, however well intentioned, cannot be achieved by first ignoring the jurisdictional strictures creating CPB.

If this appears to be an anomalous regulatory situation it is, nevertheless, beyond this agency to resolve. Under the circumstances, the only prudent policy is to acknowledge the apparent inconsistency between our regulatory responsibility over broadcasting, in general, and the specific restriction of our authority in Section 398; and to leave it to Congress to take enforcement action where appropriate or to affirmatively delegate that responsibility to this Commission. In the absence of Congressional clarification of our responsibilities, the express prohibition of authority must carry greater weight than the presumed Congressional intent elsewhere in the Act.

Dissenting Statement of Commissioner Benjamin L. Hooks

In Re: Complaint of Accuracy in Media, Inc.

It is my belief that the Commission either has jurisdiction and authority over the codified activities of the Corporation for Public Broadcasting (hereinafter, CPB) or that such jurisdiction has never been accurately pinpointed and the Commission should assert it. In that connection, and throughout this discussion, I wish to stress that I am maintaining a critical distinction between "regulating" CPB (which I do not advocate) and administering all those provisions of the Communications Act (47 U.S.C. 151 *et seq.*) relating to public broadcasting (47 U.S.C. §396 *et seq.*).

First, there is no serious doubt that the Commission, by the clear language of the Communications Act and consistent court interpretation, has plenary and expansive authority over all radio and television broadcasting in the nation, including those noncommercial stations CPB was established to serve. The Commission was instrumental in reserving these so-called "public" channels which laid the foundation for CPB, it participated extensively in the legislative process which created CPB, it is called upon regularly by Congress to comment on CPB's activities, including appropriations, and—as with all broadcasting—it assigns frequencies for and licenses to (or withholds licenses from) noncommercial stations according to the same public interest, convenience and necessity standards applicable to all stations. There is no question that individual noncommercial licensees are ultimately responsible for the broadcast of CPB programming, just as commercial stations are responsible for matter supplied by the commercial networks.

Moreover, the inescapable language of the Communications Act empowers the Commission to "execute and enforce the provisions of this Act", of which Section 396 *et seq.* is an incorporated part.[1] If there is a patent ambiguity arising out of the language of Section 398,[2] the ambiguity should be resolved

[1] Because I consider the principle of overall administration of Section 396 *et seq.* to transcend the narrow issue of adjudication of 396(g)(1)(A) complaints presented by the instant case, I merely explain parenthetically that I construe the "objectivity and balance" portions to mean no more than convential fairness doctrine (§315(a)(4)) obligations in different terms.

[2] Section 398 (47 U.S.C. §398) states as follows:

> Nothing contained in this part shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the charter or bylaws of the Corporation, or over the curriculum, program or instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

along the customarily prudent rules of statutory construction; *viz*, in *pari materia* with the entire Communications Act (and the comprehensive regulatory scheme established thereby) with prepondent attention to the unequivocal edict of Section 1 of the Act that the Commission "administer and enforce" the Act, Section 396 included. And, unless it is assumed that it is the primary purpose of Congressional law to disrupt and confound the activities of the populace, it cannot be reasonably argued that administration and enforcement of a duly adopted statute (Section 396, for example) is the type of "interference" intendedly proscribed by Section 398; the proposition that equitable administration of federal law is coextensive with "direction, supervision or control" (47 U.S.C. §398) is, on its face, uniquely cynical. Hence, I find the apparent conflict between Sections 1 and 398 of the Communications Act illusory rather than real and our administration of those portions of the Act pertaining to CPB wholly consistent with law.

Additionally, the argument that seeks to equate the Commission's regulatory responsibilities with respect to CPB to our lack of jurisdiction over commercial television networks falls from two myopic infirmities. The argument to which I advert is that, as in the case of commercial broadcasting, we have jurisdiction only over individual licensees rather than the central program sources. The two flaws are: (1) CPB is not a network and, in fact, is expressly barred from being one by Section 396(g)(3); and (2) while there is not a single reference to commercial networks in the Communications Act, let alone a conferral of jurisdiction, there are many and specific regulations relating to CPB's powers, duties, and limitations. Thus, any such analogy is, *prima facie*, inapposite.

There are in the larger sense, however, other more compelling (if not more cogent) reasons why the Commission is the proper body to ensure CPB's compliance with the Communications Act. Inasmuch as it is obvious that *somebody* must administer those laws relating to CPB, it is my contention that the Commission,

an independent, bi-partisan regulatory agency, whose members are appointed by the President with the advice and consent of the Senate, and whose actions are subject to established, reasonably expeditious review by the judicial and legislative branches of government, is the most appropriate entity to handle the task. In addition to the foregoing properties, the Commission—with all attendant faults and errors—executes the difficult and sensitive regulation of broadcasting on a day-to-day basis and, I believe, has evolved a better "feel" (for lack of a more precise characterization) for such matters than any other existing body.

While I suppose that an aggrieved party could refer alleged violations of Section 396 to the Department of Justice for prosecution, that places the Executive Branch of government in "control" of codified CPB activities. This not only leaves room, theoretically, for partisan application but limits the usefulness of the doctrine of primary jurisdiction of an administrative agency under which initial claims can receive thorough consideration. On the other hand, with all due deference to the Senator who suggested that Congress could control CPB through its appropriations function, "purse-string" power is far from the most appropriate or effective manner of administering delicately etched law. It is for that reason that Congress has provided the Commission with a full panoply of administrative prerogatives in the broadcast field from declaratory rulings,[3] to cease and desist, to forfeiture, to short-term renewal, to revocation, to injunction[4] and so on in order that the regulatory actions can be shaped to best serve the ends of justice and the public interest. "Purse-string" power, especially in the case of multi-year appropriations, is likely to mean too little (or too much) too late; it lacks the flexibility required to fashion adequate resolutions and the public—whose funds and frequencies are involved—has no significant entree into Congressional

[3] 5 U.S.C. §554(e).

[4] Seriatum, 47 U.S.C. §§312, 503, 309, 312, 401.

budgetary proceedings while it is accustomed to, and regularly does, direct its inquiries and grievances about noncommercial broadcasting to the Commission, as witness the instant complaint. Consequently, abjuration in the instant matter has effectively deprived any complainant of a forum wherein the matter of possible violations can be thoroughly considered and adjudicated. To my way of thinking, that result is manifestly unsatisfactory.

Finally, it cannot be asserted with exceptional rationality that the Commission (as opposed to some other power) should not be entrusted with the fragile chore of administering those Communications Act provisions applying to CPB because of the potential for official mischief or abuse. Congress and the courts have already entrusted the Commission with immense power to regulate the nearly 10,000 broadcast stations in this country and, considering the overwhelmingly greater audiences and influence of the commercial stations, Commission administration of CPB's statutory obligations is likely to have on national communications (in the words of the late Senator Everett Dirksen) "all the impact of a snowflake on the bosom of the Potomac." If the Commission cannot be entrusted to fairly administer the Communications Act provisions relating to CPB (with a $45 million dollar a year budget and fewer than 1,000 noncommercial station outlets), then it is illogical to presume that it can fairly regulate the powerful, multi-billion dollar broadcast industry, with its 26,000 (approximately) services.[5] And, in repetition, should any such errors or abuses occur, they are immediately and reassuringly subject to judicial correction.

In view of the above, and fully comprehending the serious and touchy political implications of this posture, I believe we have incorrectly avoided a legitimate regulatory obligation.

I respectfully dissent.

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[5] *38th Annual FCC Report*. p. 160 (1972).

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 74-1028

Accuracy in Media, Inc., *Petitioner*

v.

Federal Communications Commission and the United States of America, *Respondents*

Argued April 14, 1975

Decided October 16, 1975

* * * * * *

Before BAZELON, *Chief Judge*, LEVENTHAL, *Circuit Judge* and WEIGEL, **United States District Judge for the Northern District of California.*

BAZELON, *Chief Judge:*

Accuracy in Media, Inc. (AIM) filed two complaints with the FCC against the Public Broadcasting Service (PBS) concerning two programs distributed by PBS to its member stations. AIM alleged that the programs, dealing with sex education and the American system of criminal justice, were not a balanced or objective presentation of each subject and requested the FCC to order PBS to rectify the situation. The legal basis for AIM's complaints was the Fairness Doctrine[1] and 47 U.S.C. §396

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[1] *See* The Fairness Doctrine and the Public Interest Standards, 48 F.C.C.2d 1, *appeal docketed National Citizens Comm. for Broadcasting v.*

(g)(1)(A)(1970). On its initial hearing of the matter, the FCC concluded that the PBS had not violated the Fairness Doctrine and invited comments from interested parties on its authority to enforce whatever standard of program regulation was contained in § 396(g)(1)(A).[2] AIM does not seek review of the Commission's decision on the Fairness Doctrine issue.

Section 396(g)(1)(A) is part of the Public Broadcasting Act of 1967, an act which created the Corporation for Public Broadcasting (CPB) and authorized it to fund various programming activities of local, non-commercial broadcasting licensees.[3] Section 396(g)(1)(A) qualifies that authorization in the following language:

> In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—
>
> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to non-commercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. . . .

AIM contends that since the above-mentioned PBS programs were funded by the CPB, pursuant to this authorization, the programs must contain "strict adherence to objectivity and balance", a requirement AIM contends is more stringent than

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FCC, No. 74–1700 (D.C.Cir. July 3, 1974); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964). *Cf.* 47 U.S.C. §315(a) (1970).

[2] Accuracy in Media, Inc., 39 F.C.C.2d 416, 420 & n.1 (1973).

[3] *See*—U.S.App.D.C. at page—, 521 F.2d at page 291 *infra*.

the standard of balance and fairness in overall programming contained in the Fairness Doctrine.[4] AIM alleges that the two relevant programs did not meet this more stringent standard of objectivity and balance.

After consideration of the comments received on the matter, invited in its preliminary decision discussed above, the Commission concluded that it had no jurisdiction to enforce the mandate of §396(g)(1)(A) against CPB.[5] Having reached this result, the Commission thought it inappropriate to comment on what standard of program regulation was established by §396(g)(1)(A) and whether that standard was more stringent than the Fairness Doctrine. The Commission did not explicitly consider whether the standard of §396(g)(1)(A), whatever that standard might be, could be enforced against individual non-commercial licensees under the traditional jurisdictional grants contained in the Federal Communications Act. AIM petitions for review of the Commission's decision arguing that the Commission wrongly concluded that it had no jurisdiction to enforce the mandate of §396(g)(1)(A) against the CPB.

I. The Organization of Public Broadcasting in the United States

Resolution of the issues raised by AIM's petition requires an

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[4] *See* Brief for Petitioner Accuracy in Media, Inc., at 38–42. Apparently, AIM contends that §396(g)(1)(A) expands the Fairness Doctrine in two ways. First, under §396(g)(1)(A) the licensee, AIM argues, must achieve a balanced presentation of issues in each program or series of programs and may not rely on balanced discussion in overall programming to satisfy the Section, as the licensee may to satisfy the Fairness Doctrine. *See* note 1 *supra*. Second, the use of the term "objective", somewhat foreign to Fairness Doctrine discussion, suggested to AIM that a more searching inquiry into alleged factual inaccuracies than contemplated by the Fairness Doctrine, *see* note 39 *infra*, is contemplated by § 396(g)(1)(A).

[5] Accuracy in Media, Inc., 43 F.C.C.2d 851 (1973).

understanding of the operation of the public broadcasting system. There are three tiers to this operation, each reflecting a different scheme of governmental regulation. The basic level is comprised of the local, noncommercial broadcasting stations that are licensed by the FCC[6] and, with a few exceptions, [7] subject to the same regulations as commercial licenses. Through the efforts of former Commissioner Frieda Hennock, the FCC has reserved exclusive space in its allocation of frequencies for such noncommercial broadcasters.[8] Other than this specific reservation, noncommercial licenses are still subject to the same renewal process and potential challenges as their commercial counterparts.

Such was the state of the public broadcasting system until the passage of the Educational Television Facilities Act in 1962.[9] The Act added the element of government funding to public broadcasting by establishing a capital grant program for noncommercial facilities. This second level of the system was reorganized and expanded by the Public Broadcasting Act of 1967[10] which created the Corporation for Public Broadcasting

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[6] 47 U.S.C. §307 (1970). *See also* 47 C.F.R. §73.621 (1973).

[7] *See, e.g.*, 47 C.F.R. §73.621 (1973) (qualification standards for noncommercial broadcasters and regulations pertaining to advertising); 47 U.S.C. §399 (1970) (educational broadcasting stations prohibited from editorializing and required to keep tapes of controversial programs).

[8] *See* Sixth Report and Order on Television Allocation 41 F.C.C. 148, 158-67, 227-563 *passim* (1952); *id.* at 588-605 (Hennock, Comm'r, concurring in part, dissenting in part). *See also Joint Council on Educ. Broadcasting v. FCC*, 113 U.S.App.D.C. 86, 305 F.2d 755 (1962); Comm. for Economic Development, Broadcast and Cable Television: Policies for Diversity and Change 47 (1975). For an early history of the reservation of broadcast frequencies, *see* J. Powell, Channels of Learning: The Story of Educational Television (1962).

[9] Educational Television Facilities Act of May 1, 1962, Pub.L.No. 87-447, 76 Stat.64.

[10] Public Broadcasting Act of Nov. 7, 1967, Pub.L.No. 90-129, 81 Stat. 365.

(CPB). The Corporation, the product of a study made by the Carnegie Commission on Educational Television,[11] was established as a funding mechanism for virtually all activities of noncommercial broadcasting. In setting up this nonprofit, private corporation, the Act specifically prohibited CPB from engaging in any form of "communication by wire or radio."[12]

The third level of the public broadcasting system was added in 1970 when CPB and a group of noncommercial licensees formed the Public Broadcasting Service (PBS) and National Public Radio.[13] The Public Broadcasting Service operates as the distributive arm of the public television system. As a nonprofit membership corporation, it distributes national programming to approximately 150 educational licensees via common carrier facilities. This interconnection service is funded by the Corporation (CPB) under a contract with PBS; in addition, much of the programming carried by PBS is either wholly or partially funded by CPB. National Public Radio provides similar services for noncommercial radio. In 1974, CPB and the member licensees of PBS agreed upon a station program cooperative plan[14] to insure

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[11] *See* Burke, *The Public Broadcasting Act of 1967: Part I: Historical Origins and the Carnegie Commission*, 6 *Educ. Broadcasting Rev.* 105-119 (1972); *Part II: The Carnegie Commission Report, Development of Legislation, and the Second National Conference on Long-Range Financing*, 6 *Educ. Broadcasting Rev.* 178-192 (1972); Broadcast and Cable Television, *supra* note 8, at 47-48.

[12] The words "communication by wire or radio" are in the general jurisdictional grant of the FCC in 47 U.S.C. §§151, 152. The 1967 Act categorically lists the facilities that the Corporation may not own or operate, 47 U.S.C. §396(g)(3). All of these facilities come within the statutory definition of communication by wire or radio as set forth in 47 U.S.C. §153(a) and (b). We discuss in Part II the relevance of this prohibition to the denial of jurisdiction by the FCC.

[13] *See* Broadcast and Cable Television, *supra* note 8, at 47.

[14] The Station Program Cooperative (SPC) is a unique concept in program selection and financing for public television stations. Though the idea

local control and origination of noncommercial programming funded by CPB. Though PBS is the national coordinator under this scheme, it is not a "network" in the commercial broadcasting sense, and does not engage in "communication by wire or radio," except to the extent that it contracts for interconnection services.

II. FCC Jurisdiction Over the Corporation for Public Broadcasting

With the structure of the public broadcasting system in view, we turn to AIM's contention that the FCC should enforce the mandate of §396(g)(1)(A) against the CPB. Since the Section is clearly directed to the Corporation and its programming activities, we have no doubt that the Corporation must respect the mandate of the Section. However, we conclude that nothing in the language and legislative history of the Federal Communications Act or the Public Broadcasting Act of 1967 authorizes the FCC to enforce that mandate against the CPB.

Section 398 of the Communications Act expresses the clear intent of Congress that there shall be no direct jurisdiction of the FCC over the Corporation. That section states that nothing in the 1962 or 1967 Acts "shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the

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of public television as a "fourth network" had been proposed at various times, the 1974 plan reversed this trend toward centraliziation. Under the SPC, certain programming will be produced only if the individual local stations decide together to fund the production. The local licensees will be financed through the CPB and other sources; the funding of specific programs will be by a 4 to 5 ratio (station funds to national cooperative funds). The aim of this cooperative is to reinforce the existing licensee responsibility for programming discretion. Through this plan the local stations will eventually assume the responsibility for support of the cooperative and the Corporation will concentrate on new programming development. *See* N. Katzman, Public Television's Station Program Cooperative (mimeo, 1974).

United States to exercise any direction, supervision or control over educational telelvision or radio broadcasting, or over the Corporation or any of its grantees or contractors . . .." Since the FCC is obviously an "agency . . . of the United States" and since any enforcement of §396(g)(1)(A) would necessarily entail "supervision" of the Corporation, the plain words of subsection (2) preclude FCC jurisdiction. We decline to rely entirely on the literal meaning of §398, however. Section 399 of the 1967 Act, as amended in 1973,[15] is contrary to the §398 prohibitior in that it mandates "supervision" of noncommercial licenses and contemplates FCC enforcement.[16] The conflict between §398 and §399 creates at least an ambiguity which casts a cloud on the literal meaning of §398. To resolve any doubts created thereby, we look to the legislative history of the 1967 Act for extrinsic evidence of its meaning.[17]

Congress desired to establish a program funding agency which would be free from governmental influence or control in its operations. Yet, the lawmakers feared that such complete autonomy might lead to biases and abuses of its own. The unique position of the Corporation is the synthesis of these competing influences. Reference to the legislative history of the

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[15] 47 U.S.C. §399 (Supp. III 1973).

[16] Section 399 prohibits noncommercial licensees from political editorializing and requires them to keep tapes of controversial programming. This requirement implies a supervisory role for the FCC over the record-keeping.

[17] Section 398, formerly §397, was amended by the 1967 Act to include the Corporation and its activities. The original section was enacted as a provision of the Educational Television Facilities Act of 1962. The prohibition on federal interference was included then as part of an understanding that "the FCC is not to exercise any control of funds under this program". S.Rep.No.67, 87th Cong., 2d Sess., at 9 (1962), U.S.Code Cong. & Admin.News 1962, pp. 1614, 1620. The expansion of the prohibition to apply to the Corporation and its activities is in keeping with the original fear that financial support by the Government could lead to control over speech.

1967 Act shows a deep concern that governmental regulation or control over the Corporation might turn the CPB into a Government spokesman. Congress thus sought to insulate CPB by removing its "programming activity from governmental supervision."[18] Representative of this intent is the following statement from the Report of the House Committee on Interstate and Foreign Commerce:[19]

> How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.
>
> Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation, directed by a Board of Directors, none of whom will be Government employees, will provide the most effective insulation from

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[18] H.R.Rep.No.572, 90th Cong., 1st Sess., at 19 (1967), U.S.Cong. & Admin.News 1967, pp. 1772, 1810.

[19] *Id.*, at 15, U.S.Code Cong. & Admin.News 1967, p. 1805. Senator Pastore, in his opening statement to the subcommittee hearings on the 1967 Act, emphasized his concern:

> I intend to see that a full record is developed on this point and every possible safeguard written into the legislation necessary to assure complete freedom from any Federal Government interference over programming.

Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 90th Cong., 1st Sess., 9 (1967) (*Senate Hearings*). *See Senate Hearings*, 250 (Remarks of Newton Minow); *Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce* (*House Hearings*), 90th Cong., 1st Sess., 493 (1967) (Statement of E. William Henry); 113 Cong.Rec.26384 (1967) (Remarks of Rep. Staggers).

> Government control or influence over the expenditure of funds.

In addition to this legislative history and the aforementioned prohibition contained in §398, we note that any FCC jurisdiction over the CPB would constitute a radical extension of the FCC's basic jurisdictional grant. The jurisdictional provisions of the Communications Act limit FCC regulation to "interstate and foreign communication by wire or radio." The Corporation for Public Broadcasting is expressly forbidden to engage in such activities.[20] While the Supreme Court has described the jurisdictional powers of the FCC as "not niggardly, but expansive,"[21] there are limits to those powers. No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in "communication by wire or radio."

Petitioner's reliance upon FCC jurisdiction over cable television franchises to support its jurisdictional claim is misplaced. Jurisdiction over CATV was expressly predicated upon a finding that the transmission of video and aural signals via the cable was "interstate . . . communication by wire or radio."[22] Further,

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[20] *See* note 12, *supra*. *See also* 47 U.S.C. §§ 301, 303, (1970).

[21] *National Broadcasting Co. v. United States*, 319 U.S. 190, 219, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

[22] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168, 88 S.Ct. 1994, 2000, 20 L.Ed.2d 1001 (1968). In *Southwestern*, the Court recognized the extension of FCC jurisdiction to CATV as part of "the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." 392 U.S. at 172-73, 88 S.Ct. at 2003. Cable television was an unforseen *technological* innovation at the time of the 1934 Communications Act; Congress intended to include forthcoming scientific improvements within the FCC's jurisdiction. The CPB, however, was not a technological innovation and was created by Congress itself. The intended limits to FCC regulation thus could have been changed and were not. The intent of the §398 prohibition is thus manifest. *See also Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972).

assertions of "jurisdiction" over networks[23] are really no more than claims of expansive authority over the owned or affiliated individual licensees. In no case has the FCC taken direct jurisdiction over a network; in any event, CPB cannot be considered a network. In view of these prevailing limits, we will not presume that Congress meant by §396(g)(1)(A) to radically alter the jurisdictional base of the FCC absent a clear statement to that effect.[24]

AIM maintains that this view of FCC jurisdiction to enforce §396(g)(1)(A) renders the Section nugatory and hence ignores the Congressional sentiment that biases and abuses within the public broadcasting system should be controlled.[25] We do not view our holding on the FCC's jurisdiction as having that effect. Rather, we take notice of the carefully balanced framework designed by Congress for the control of CPB activities.

The Corporation was established as nonprofit and nonpolitical in nature[26] and is prohibited from owning or operating "any television or radio broadcast station, system or network, community antenna system, or interconnection, or production facility."[27] Numerous statutory safeguards were created to

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[23] *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Iacopi v. FCC*, 451 F.2d 1142 (9th Cir. 1971); *Mount Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *see also* Appalachian Research & Defense Fund, 39 F.C.C.2d 708, 710-12 (1973); Phillip H. Schott, 29 F.C.C.2d 35, 36 (1971) (in which the Commission expressly refused to assert jurisdiction over networks).

[24] *See United States v. American Trucking Ass'n*, 310 U.S. 534, 546-47, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); cases cited note 22 *supra; cf. Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

[25] Brief for Petitioner at 43.

[26] 47 U.S.C. §396(f) (1970).

[27] 47 U.S.C. §396(g)(3) (1970).

insure against partisan abuses.[28] Ultimately, Congress may show its disapproval of any activity of the Corporation through the appropriation process.[29] This supervision of CPB through its funding is buttressed by an annual reporting requirement.[30] Through these statutory requirements and control over the "purse-strings," Congress reserved for itself the oversight responsibility for the Corporation.[31]

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[28] Other statutory checks on the Corporation include: restricting the Board membership to no more than eight out of fifteen members from the same political party, §396(c)(1). The composition of the Board was an important issue during debate and the decision to make the Board bipartisan was a significant addition to the original Carnegie Commission proposal. The Act also requires that the CPB's accounts be audited annually by an independent accountant, §396(l)(1)(A), and *may* be audited by the General Accounting Office, §396(l)(2)(A).

[29] Section 396(k) assures that most of the CPB's operating budget be derived through the Congressional appropriation process.

[30] 47 U.S.C. §396(i) (1970).

[31] Senator Cotton explained Congressional oversight:

> If this bill becomes law . . . and if, as time goes on, we have occasion to feel that there is slanting, a bias, or an injustice, we instantly and immediately can do something about it. First, we can make very uncomfortable, and give a very unhappy experience to, the directors of the Corporation. Second, we can shut down some of their activities in the Appropriations Committee and in the appropriating process of Congress . . .. The Corporation is much more readily accessible . . . to the Congress, if it is desired to correct any injustice or bias which might appear.

113 Cong.Rec.13003 (1967). Senator Pastore rebutted any inference of Corporation lack of accountability:

> The whole responsibility here under this law is to the Congress of the United States . . .. [W]e don't have to repeat the appropriation if we feel this is a failure. This is all subject to the scrutiny of the Congress of the United States, and that is the point I want to leave here.

Senate Hearings, supra note 19 at 123.

A further element of this carefully balanced framework of regulation is the accountability of the local noncommercial licensees under established FCC practice, including the Fairness Doctrine in particular. This existing system of accountability was clearly recognized in the 1967 legislative debates as a crucial check on the power of the CPB. Congressman Staggers, chairman of the House committee which considered the Public Broadcasting Act and floor manager of the Act, described the role of local responsibility.[32]

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[32] 113 Cong.Rec. 26384 (1967) (emphasis added). *See also Hearings on H.R. 6736 & S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 188, 221 (1967):

> Mr. HYDE. We would license all the individual stations in the educational network or those not operating in the network. Their operation would be subject to our licensing authority.
>
> In that connection, we would be interested in the programming that they present. They would be getting these programs through the assistance of public corporation and that is where our relationship would lie.
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> • • • • • •
>
> Mr. HYDE. The station operator must be the judge, the licensee.
>
> Mr. KUYKENDALL. Who holds them responsible?
>
> Mr. HYDE. The FCC.
>
> Mr. KUYKENDALL. So you are the boss of this?
>
> Mr. HYDE. We are the boss in the sense that we hold a licensee responsible for everything it broadcasts. There are certain rules and regulations, certain policies, which are applicable, but the judgment as to whether a program is received or not received, or the conditions, is up to the licensee of the individual station.

Reliance on the Fairness Doctrine as one element of the CPB regulatory scheme is evident in the following exchange between Senator Thurmond and Senator Pastore:

> At all times the local stations have the right to accept or reject any program. The Corporation cannot require that a station broadcast any program. As required under present law, and as will be required under the new law, the sole responsibility for what goes out over the air rests upon the individual station licensee. This bill, I repeat, *does not impair or affect the existing statutory duty and responsibility of the station licensee.*

We find nothing in §398 which limits established FCC authority, including the Fairness Doctrine, over local noncommercial licensees.[33] The §398 prohibition against governmental interference is expressly limited to authorizations "contained in [this part]" of the Communications Act. The Fairness

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> Mr. THURMOND. . . . [W]ould the fairness doctrine promulgated by the Federal Communications Commission provide for the airing of philosophies or ideas contrary to those which may be expressed in programs prepared by the Corporation?
>
> Mr. PASTORE. Well, the licensee who accepts the program is subject to the Communications Act, and the fairness doctrine thus applies . . ..
>
> Mr. THURMOND. Would the time be offered free of charge, as is now required under the fairness doctrine to give the opposing view?
>
> • • • • • •
>
> Mr. PASTORE. Absolutely. If anyone feels he is offended under the fairness doctrine, he can appeal to the FCC and he will receive the same privileges and the same courtesies which he receives under commercial television.

113 Cong.Rec.13002 (1967). *See also House Hearings* at 250, 364, 517.

[33] While §398 prohibits FCC jurisdiction over CPB and its program-related activities, i.e., production, funding or distribution, the Commission retains its authority concerning the *broadcasting* of programs, whether funded by CPB or not. In fact, as discussed in Part III, FCC regulation of the educational licensees was seen as the ultimate check on the public broadcasting system. In this light §396(g)(1)(A) is in part a reminder to CPB that the programs it finances will be subject to the same fairness requirements as all other programming.

Doctrine and other public interest responsibilities are contained in provisions outside of the Public Broadcasting Act (§§ 390-99).[34] Additionally, subsection (1) of § 398 clearly stated that nothing in these sections of the 1967 Act shall be deemed to amend "any other provision . . . or requirement under this chapter." We thus conclude that the Commission correctly held that it may enforce the Fairness Doctrine against noncommercial licensees.

The framework of regulation of the Corporation for Public Broadcasting we have described—maximum freedom from interference with programming[35] coupled with existing public accountability requirements—is sensitive to the delicate constitutional balance between the First Amendment rights of the broadcast journalist and the concerns of the viewing public struck in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). There the Supreme Court warned that "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters"[36] will governmental interference with broadcast journalism be allowed. The Court on the basis of this rule rejected a right of access to broadcast air time greater than that mandated by the Fairness Doctrine as constituting too great a "risk of an enlargement of Government control over the content of broadcast discussion of public issues."[37]

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[34] The Fairness Doctrine finds its source of authority in the language of 47 U.S.C. §315(a) specifically, and in the "public convenience, interest and necessity" provision of 47 U.S.C. §303 (1970) generally. *See* note 1, *supra*.

[35] *See* 47 U.S.C. §396(a)(6), (g)(1)(D) (1970); *Senate Hearings* at 212 (remarks of E. William Henry).

[36] 412 U.S. at 110, 93 S.Ct. at 2090.

[37] *Id.* at 126, 93 S.Ct. at 2098.

It is certainly arguable that FCC application of the standard—whatever that standard may be—of §396(g)(1)(A) could "risk [an] enlargement of Government control over the content of broadcast discussion of public issues" in the following two ways:[38] whereas the existing Fairness Doctrine requires only that the presentation of a controversial issue of public importance be balanced in *overall* programming, §396(g)(1)(A) might be argued to require balance of controversial issues within each individual program. Administration of such a standard would certainly require a more active role by the FCC in oversight of programming. Furthermore, whereas the FCC has at present carefully avoided anything but the most limited inquiry into the factual accuracy of programming,[39] §396(g)(1)(A) by use of the term "objective" could be read to expand that inquiry and thereby expand FCC oversight of programming. Both of these potential enlargements of government control of programming, whether directed against the CPB, PBS or individual noncommercial licensees,[40] threaten to upset the constitutional balance

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[38] *See* note 4 *supra*.

[39] *See, e.g., Neckritz v. FCC*, 163 U.S.App. D.C. 409, 502 F.2d 411 (1974), *aff'g* Alan F. Neckritz, 37 F.C.C.2d 528 (1973); Hunger in America, 20 F.C.C.2d 143 (1969); The Selling of the Pentagon, 30 F.C.C.2d 150 (1971).

[40] Although § 396(g)(1)(A) by its terms is directed only to the Corporation, the question has arisen whether it may be applied against individual noncommercial licensees, given existing FCC jurisdiction over them, the fact the 1967 Act as amended imposes burdens on them not applicable to their commercial counterparts, *see* note 16 *supra;* 113 Cong. Red. 7020 (1967) (remarks of Sen. Thurmond), and the Commission's power under the "public interest" standard to enforce provisions of the Communications Act and general law against licensees. *See* 47 U.S.C. § 151 (1970); Star Stations of Indiana, Inc., 51 F.C.C.2d 95, 100-07 (1975); Alabama Educ. Television Assn., 50 F.C.C.2d 461 (1975); Uniform Policy as to Violations by Applicants of Laws of United States, 1 P & F Radio Reg. 91:495 (pt. 3) (1951).

struck in *CBS*. We will not presume that Congress meant to thrust upon us the substantial constitutional questions such a result would raise.[41] We thus construe §396(g)(1)(A) and the scheme of regulation for public broadcasting as a whole to avoid such questions.

Since AIM's original complaint was filed against the local licensees and PBS, the contention §396(g)(1)(A) applied to those entities was before the Commission and this court may review the Commission's implicit ruling that no such authority exists. *See Office of Communication of Christ Church v. FCC*, 150 U.S.App.D.C. 339, 465 F.2d 519, 523-24 & n. 17 (1972); *cf.* 47 U.S.C. §405 (1970); *Joseph v. FCC*, 131 U.S.App.D.C. 207, 404 F.2d 207, 210 (1968).

[41] It is an often stated rule that "a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts." *Lynch v. Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211 (1962). *See Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932). *See also Tarlton v. Saxbe*, 165 U.S.App. D.C. 293, 507 F.2d 1116 (1974).

Further constitutional doubts concerning an "objectivity and balance" standard may be raised on vagueness grounds. Such words may require "all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego" their First Amendment rights. *Barenblatt v. United States*, 360 U.S. 109, 137, 79 S.Ct. 1081, 1099, 3 L.Ed.2d 1115 (1959) (Black, J., dissenting); *see Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974); *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 415 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).

The constitutional doubts discussed in the text are raised by a regulatory scheme in which an administrative agency has review powers over the speech of a publicly-funded entity. The constitutional issues raised by public funding decisions which discriminate on the basis of the contents of the messages to be funded would be substantially different. We may, as did the Supreme Court in *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119-21, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973), assume the constitutional balance discussed in the text applies whether or not the actions of the licensees are considered "state" or "governmental" action, so long as the issue is the scope of FCC enforcement powers and not the permissibility of public-funding decisions. *See also Cousins v. Wigoda*, 419 U.S. 477, 483–4n. 4, 95 S.Ct. 541, 42 L.Ed.2d 595.

Our view of §396(g)(1)(A), as colored by the constitutional misgivings just expressed, does not presume the Section to be superfluous. Rather we view the provision as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire.[42] The provision is not a substantive standard, legally enforceable by agency or courts. The language of the Section comports with this view:

> The Corporation *is authorized* to–(A) *facilitate* the full development of educational broadcasting in which programs of *high quality*, obtained from diverse sources, *will be made available* . . . with strict adherence to objectivity and balance . . . (emphasis added).

The Corporation is not required to provide programs with "strict adherence to objectivity and balance" but rather to "facilitate the full development of educational broadcasting in which programs . . . will be made available . . .." We leave the interpretation of this hortatory language to the Directors of the Corporation and to Congress in its supervisory capacity. We hold today only that the FCC has no function in this scheme of accountability established by §396(g)(1)(A) and the 1967 Act in general other than that assigned to it by the Fairness Doctrine. Therefore, we deny the petition for review and affirm the Commission's decision rejecting jurisdiction over the Corporation for Public Broadcasting.

So Ordered.

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[42] This sort of statutory authorization is not unknown in the U.S.Code. *See, e. g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970); Employment Act of 1946, 15 U.S.C. § 1021 (1970); Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, 2013 (1970); National Labor Relations Act, 29 U.S.C. § 151 (1970).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-31a) is reported at 521 F.2d 288. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1a-14a) is reported at 43 FCC 2d 851.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1975, and the petition for a writ of certiorari was filed on January 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the statutory scheme of the Federal Communications Act, the Federal Communications Commission is authorized to enforce against the Corporation for Public Broadcasting the requirement in Section 396 (g)(1)(A) of the Act that controversial programs made available to noncommercial broadcasting stations must be objective and balanced.

STATEMENT

The facts, as set forth in the opinion of the Commission (Pet. App. 1a-8a) and the court of appeals (Pet. App. 15a-17a), are as follows:

In 1971, petitioner filed complaints with the Federal Communications Commission charging that two programs funded by the Corporation for Public Broadcasting ("the Corporation") and supplied to noncommercial broadcasting stations by the Public Broadcasting Service ("PBS") violated both the Commission's fairness doctrine and Section 396(g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. 396(g)(1)(A), because they were not a balanced or objective presentation of the subject. The latter provision authorizes the Corporation to

> facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature * * * .

The Commission held (1) that the Corporation had not violated the fairness doctrine,[1] and (2) that it had no

[1]Petitioner did not seek judicial review of the Commission's fairness doctrine ruling (Pet. App. 16a).

jurisdiction to enforce Section 396(g)(1)(A) against the Corporation. In making the latter ruling, the Commission held that Section 398 of the Act, 47 U.S.C. 398, which provides that nothing in Sections 390 to 399 (Part IV of Title III) of the Act (which include the Communications Act provisions relating to the Corporation), authorizes any government agency to "exercise any direction, supervision, or control over * * * the Corporation * * * ," "makes clear that the creation of the Corporation * * * by the Public Broadcasting Act of 1967 should not be construed as conferring regulatory or supervisory jurisdiction over that Corporation in the Commission unless some provision of the Act outside of Part IV either specifically confers such jurisdiction or requires it as a necessary part of the achievement of the Commission's functions" (Pet. App. 5a). The Commission ruled that no other provision of the Act either confers or requires such jurisdiction over the Corporation, which does not "operate licensed broadcast facilities" or "own or operate any interconnection or program production facilities" and "is not engaged in the interstate transmission of communications or energy by wire or radio" (*ibid.*).

The Commission also concluded that the legislative history of the Public Broadcasting Act of 1967, which created the Corporation, showed "the clear, if unspecific, intent of Congress to keep the Corporation free of government control * * * " (Pet. App. 7a). The Commission concluded that it would be "inappropriate" for it "to interpret for the guidance of the Corporation the meaning of the words 'strict adherence to objectivity and balance in all programs or series of programs of a controversial nature' " (Pet. App. 8a).

The court of appeals affirmed. Like the Commission, the court relied upon the language, statutory scheme and legislative history of the statute, and pointed out (Pet. App. 23a) that "any FCC jurisdiction over the

[Corporation] would constitute a radical extension of the FCC's basic jurisdictional grant. * * * No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity [such as the Corporation] not engaged in 'communication by wire or radio.' "

ARGUMENT

The court of appeals' decision is correct, there is no conflict of decisions, and further review is unwarranted.

The language of the Act shows that Congress did not intend the Commission to enforce Section 396(g)(1)(A) against the Corporation. As both the Commission and the court of appeals held (Pet. App. 4a, 20a-21a), Section 398 of the Act, which provides that "[n]othing contained in sections 390 to 399 of this [Act] * * * authorize[s] any * * * agency * * * of the United States to exercise any direction, supervision, or control over * * * the Corporation * * * ," precludes the Commission from enforcing against it the "objectivity and balance" standard in Section 396(g)(1)(A).[2] If the Commission were to attempt to require the Corporation to comply with that standard, which deals with the contents of the programs the Corporation makes available to noncommercial broadcasting stations, the agency would be exercising "direction," "supervision" and "control" over the Corporation.

As the court of appeals pointed out, granting the Commission such supervisory authority over the Corporation "would constitute a radical extension of the [Commis-

[2]Contrary to petitioner's contention (Pet. 11), with respect to the Corporation this conclusion is not inconsistent with Section 399 of the Act, 47 U.S.C. (Supp IV) 399, which gives the Commission a limited supervisory role over licensees. As explained in the text, the Corporation is not a licensee.

sion's] basic jurisdictional grant" (Pet. App. 23a). The corporation neither owns nor operates any communication facilities, and indeed is expressly prohibited from doing so. Section 396(g)(3). Since it merely provides funds for the production of programs, it is not "engaged in the interstate transmission of communications or energy by wire or radio" (Pet. App. 5a; see 47 U.S.C. 151, 152, 301).

The Commission has never exercised jurisdiction over such an entity and the courts traditionally have been "hesitant to conclude that Congress intended to grant" a regulatory agency "other than the customary power" in the absence of clear legislative history that it did so. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 546. There is no legislative history indicating that Congress intended to give the Commission regulatory power over the Corporation.

The legislative history in fact confirms that Congress did not intend the Commission to enforce Section 396(g)(1)(A) against the Corporation. See, *e.g.*, H.R. Rep. No. 572, 90th Cong., 1st Sess. 19 (1967). As the court of appeals pointed out (Pet. App. 24a), instead of supervision by the Commission, Congress designed a "carefully balanced framework * * * for the control of [the Corporation's] activities," which in large part depends upon the power of Congress to appropriate money for the Corporation. See 47 U.S.C. 396(k). The court of appeals correctly concluded that Congress "reserved for itself the oversight responsibility for the Corporation" (Pet. App. 25a). Congress intended the Commission to regulate the activities of the noncommercial segment of the broadcasting industry, but as the Commission and court noted (Pet. App. 8a, 27a-28a), it contemplated that such authority would be exercised over licensees, and not over the Corporation.

The Commission's interpretation of the statute as not authorizing it to enforce Section 396(g)(1)(A) against the Corporation reflects the agency's settled practice, the statutory language and scheme, and the legislative history. This construction is entitled to substantial weight. Cf. *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349, 352.

Contrary to petitioner's contention (Pet. 15-17), the decision of the court of appeals does not conflict with any decision of this Court. Each of the cases petitioner cites involved entities engaged in wire or radio communications;[3] the Corporation, however, is prohibited from such activity. Those decisions, which are fully consistent with the congressional intention to give the Commission broad authority over wire and radio communications, do not support petitioner's attempt to extend the agency's power into new areas.

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[3] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, and *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, both involved the Commission's regulation of radio stations which it licensed under the Act. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, involved Commission authority to regulate cable television, which the court of appeals here correctly pointed out (Pet. App. 23a, n. 22), "was an unforeseen *technological* innovation at the time of the 1934 Communications Act; Congress intended to include forthcoming scientific improvements within the FCC's jurisdiction. The [Corporation], however, was not a technological innovation and was created by Congress itself. The intended limits to FCC regulation thus could have been changed and were not."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-977

ACCURACY IN MEDIA, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT PUBLIC BROADCASTING SERVICE IN OPPOSITION

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT PUBLIC BROADCASTING SERVICE IN OPPOSITION

Respondent Public Broadcasting Service hereby presents its brief in opposition to the Petition of Accuracy in Media, Inc., for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

QUESTION PRESENTED

Was the Court of Appeals correct in holding that the Federal Communications Commission has no jurisdiction to enforce Section 396(g)(1)(A) of the Communications Act of 1934 against the Corporation for Public Broadcasting?

STATEMENT OF THE CASE

This case involves the disposition made by the Federal Communications Commission ("Commission") of two complaints filed by the Petitioner, Accuracy in Media, Inc. ("AIM"). The complaints, filed on October 16 and November 20, 1971, alleged that two programs funded by the Corporation for Public Broadcasting ("CPB") and distributed to noncommercial educational television stations throughout the country by the Public Broadcasting Service ("PBS") violated the Fairness Doctrine and the provision of Section 396(g)(1)(A) which requires that programs or series of programs of a controversial nature made available to noncommercial educational television or radio broadcast stations adhere strictly to objectivity and balance.[1]

The Commission ruled on January 23, 1972, that no violation of the Fairness Doctrine had occurred. The Commission declined, however, to rule on AIM's complaint concerning Section 396(g)(1)(A) of the Communications Act. Rather, while noting its own doubts whether "the section [was] intended by Congress to set forth a specific standard subject to administrative enforcement rather than merely a general enunciation of the Corporation's functions," it requested briefs from interested parties on this issue and on the ques-

[1] Section 396(g)(1)(A) provides as follows:

"In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature; . . ."

tion of whether, assuming it had jurisdiction, the provision imposed a standard other than the Fairness Doctrine.[2] AIM, PBS, CPB and others filed comments in response to the Commission's invitation.

On November 15, 1973, the Commission released its decision on the matter. *Accuracy in Media, Inc.*, 43 FCC2d 851 (1973).[3] It found that it did not have jurisdiction to enforce Section 396(g)(1)(A) against CPB. The Commission based its holding on Section 398 of the Act and the legislative history of the Public Broadcasting Act of 1967, which established CPB. It held that the language of Section 398 as well as the rest of of the Act and its legislative history constituted a clear congressional statement that CPB was to be free from government supervision of, or interference with, its activities. The Commission concluded that its exercise of jurisdiction to enforce Section 396 (g)(1)(A) would be inconsistent with that statutory scheme. The Commission did not reach the issue of what standard is imposed by the "objectivity and balance" provision of Section 396(g)(1)(A) and rejected the argument that the Public Broadcasting Act divested it of jurisdiction with respect to programs made available to the stations by CPB. *Id.* at 854, n. 4, Pet App. at 8a.

AIM appealed to the Court of Appeals for the District of Columbia Circuit and PBS, CPB and other parties intervened. On October 16, 1975, the Court of Appeals affirmed the Commission's decision, agreeing that the wording and legislative history of the Public Broadcasting Act of 1967 as well as the overall struc-

[2] *Accuracy in Media, Inc.*, 39 FCC2d 416, 420 n. 1 (1973).

[3] The decision is reprinted in the Appendix to the Petitioner's Petition for Certiorari at page 1a. Future references to material in that Appendix will be designated "Pet. App."

ture created by the Public Broadcasting Act supported the conclusion that Congress did not intend the Commission to assert regulatory jurisdiction over CPB. *Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288 (D.C. Cir. 1975), Pet. App. at 15a.

ARGUMENT

The issue presented by this case, whether the Federal Communications Commission has jurisdiction to enforce a provision of the Public Broadcasting Act against CPB, is a narrow one which has no impact on the regulatory scheme established by the Communications Act of 1934. The jurisdiction of the Commission over its licensees, both commercial and noncommercial educational (or public),[4] is unaffected by the decision below. Those licensees remain fully subject to the Commission's jurisdiction. Moreover, the decision below is clearly correct.

I. Introduction—The Structure Of The Public Television Broadcasting System

In order to understand the issue raised by this case, a brief description of the structure of the public television broadcasting system in the United States is helpful. That system consists of basically three elements: (1) the local public radio and television stations; (2) CPB; and (3) PBS.

[4] The term "public" broadcasting was introduced by the Carnegie Commission Report on Educational Television, *The Report of the Carnegie Commission on Educational Television: Public Television, A Program for Action* (1967), and the Public Broadcasting Act. P.L. 90-129, 11-7-67, 81 Stat. 365, 47 U.S.C. § 396 *et seq.* The stations themselves are licensed by the Commission as noncommercial educational television stations. *See* 47 C.F.R. § 73.621.

Local public television stations,[5] like other broadcasters, are ultimately responsible for the selection of the program material which they broadcast. They are, like commercial broadcasters, licensees of the Federal Communications Commission and are subject to its full regulatory authority. Indeed, with certain exceptions not herein relevant,[6] public television and radio stations are subject to the same rules and regulations as commercial broadcasters, including the Fairness Doctrine. *Accuracy in Media, Inc.,* 43 FCC2d 851, 854 (1973), Pet. App. at 8a.

CPB is a nonprofit organization established pursuant to the Public Broadcasting Act of 1967, 47 U.S.C. § 396 *et seq.* It is incorporated under the laws of the District of Columbia. CPB is a private corporation which is expressly stated by the Act not to be an agency of the United States. 47 U.S.C. § 396(b). It is governed by a board of fifteen directors appointed by the President and confirmed by the Senate. 47 U.S.C. §396(c). Under the Act, CPB is charged with promoting, facilitating and aiding the development of a public broadcasting system which will provide high quality programming obtained from diverse sources yet responsive to both local and national needs. CPB is to provide leadership and financial assistance in connection with a wide variety of activities which Congress deemed vital to the realization of public broadcasting's potential to serve the American public. At the same time, Congress sought to insure the independence and auton-

[5] Since this case involves only public television programs, PBS will limit its discussion to public television stations although the principles apply equally to public radio stations as well.

[6] *See, e.g.,* 47 U.S.C. § 399; 47 C.F.R. § 73.621.

omy of the local public stations. Thus, CPB was also charged with insulating the system from external pressure and influence and was enjoined to carry out its functions so as to preserve the maximum freedom and independence of the local stations. CPB is also precluded from owning or operating a broadcast station, system, network, cable television system, interconnection or program production facility. 47 U.S.C. §§ 396 (a) & (g).

The third major component of the public television system is PBS. PBS is not a creature of the Public Broadcasting Act nor is it mentioned in it. It was organized in 1969 by several public television stations, with the aid of CPB, to serve as the program distribution arm of the system. PBS is a nonprofit membership corporation whose membership consists of the licensees of approximately 250 noncommercial educational television stations. PBS distributes national public television programs to its members by means of facilities provided by communications common carriers. PBS also selects and schedules those programs for such distribution and manages cooperative funding mechanisms used by its members to obtain a portion of the national programming it distributes. The remainder of the programs are funded by CPB, corporations, foundations and other entities. Regardless of how a program is funded, PBS' members retain complete freedom as to whether or not they will broadcast programs distributed by it.

II. The Issue Raised In This Case Does Not Affect The Regulatory Scheme Of The Communications Act

The sole question raised by the Petition for Certiorari is whether the Commission and the Court properly concluded that the Commission lacks jurisdiction to enforce the "objectivity and balance" provision of Section 396(g)(1)(A) against CPB.[7] The Petitioner argues that this question warrants consideration because the decision below is inconsistent with principles of broadcast regulation established by this Court and raises important questions of federal law.

The assertions lack merit. The only question decided by the Commission and the only issue before the Court of Appeals was whether the Commission had jurisdiction to enforce the "objectivity and balance" provision of Section 396(g)(1)(A) against CPB. Both the Commission and the Court of Appeals decided after careful and close scrutiny of the statute and its legislative history that the Commission lacked such jurisdiction.[8] Both the Commission and the Court of Appeals expressly re-affirmed the Commission's full regulatory authority with respect to public television stations.[9] Thus the regulatory scheme established by the Communications Act of 1934 remains totally unaffected by the decision below. Public broadcast stations, just like their commercial counterparts, remain fully subject to the Commission's jurisdiction and are required to adhere to its rules, regulations and policies, including the Fairness Doctrine. Just like their commercial counterparts, public broadcast stations must still demonstrate that they are operating in the public interest, and they

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[7] Although the Commission also denied the Petitioner's Fairness Doctrine complaint, *Accuracy in Media, Inc.*, 39 FCC2d 416 (1973), the Petitioner did not seek judicial review of that determination.

[8] 43 FCC2d at 854, Pet. App. at 7a-8a; 521 F.2d at 292, Pet. App. at 20a.

[9] 43 FCC2d at 854, Pet. App. at 8a; 521 F.2d at 295, Pet. App. at 27a-28a.

are answerable to the Commission for any dereliction in the fulfillment of their obligations under the Communications Act. Nothing in the decision of the Court of Appeals can be employed, either by its terms or by analogy, to foreclose or limit the Commission's jurisdiction over its public television licensees.

The Petitioner's efforts to demonstrate a conflict with the principles enunciated by this Court in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), are misdirected. Those cases dealt with different issues and different provisions of the Communications Act. Nothing in the decision below undermines or is inconsistent with the holding or rationale of those decisions. Under the decision below, the Commission remains the sole entity responsible for the implementation of the legislative policies established in the Communications Act. Section 396(g)(1)(A), while a part of that Act, was enacted, along with Section 398, as part of the Public Broadcasting Act of 1967. That Act created a new legislative scheme to provide assistance and encouragement to noncommercial educational broadcasting. The scheme of that Act, while building on the existing broadcast system, is markedly different from the regulatory scheme established in the Communications Act itself. It seeks different goals from the Communications Act and employs different mechanisms for the realization of those goals. It is thus not surprising that Congress devised a different method to review CPB's performance under that Act. *Pottsville, Southwestern* and *Red Lion* are simply inapposite.

III. The Decision Of The Court Of Appeals Is Correct

Even if the issue in this case possessed the importance the Petitioner attributes to it, there is no reason for this Court to grant certiorari. The decision of the Court of Appeals is clearly correct and there are no conflicting decisions.

Both the Commission and the Court of Appeals concluded that Section 398 precludes the Commission from asserting jurisdiction to enforce Section 396(g)(1)(A) against CPB and that review of CPB's performance under that provision is reserved to Congress. That conclusion is fully supported by the language of the provisions themselves, by the scheme established by the Act and by its legislative history. Section 396(g)(1)(A) provides that CPB is authorized to:

> facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature; . . .

Section 398 of the Act provides that:

> Nothing contained in . . . [Sections 390-399] shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors, . . .

Since the Commission is clearly an agency of the United States, Section 398, by its terms, precludes the Commission's assertion of jurisdiction to enforce Section 396(g)(1)(A). This conclusion is further sup-

ported by the language of Section 396(g)(1)(A) itself. Thus, the section authorizes CPB, subject to the "objectivity and balance" provision, to "*facilitate* the full development of educational broadcasting in which programs of *high quality*, obtained from *diverse sources*" are made available to the local stations. [Emphasis added.] As the Court of Appeals correctly noted, such language is language of discretion, not of command. It establishes "a set of goals to which the Directors of CPB should aspire," 521 F.2d at 297, Pet. App. at 31a, not a substantive standard enforceable at law. Indeed, Commission enforcement of these provisions would inevitably enmesh the Commission in subjective determinations as to whether CPB was adequately "facilitating" the development of educational broadcasting or whether the programs made available to the stations were of sufficient quality or obtained from sufficiently diverse sources to satisfy the section. The Commission, as an agency of the United States, is uniquely unsuited to review such matters. *Cf. Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

Further, it is clear from the legislative history of the Act that Congress did not intend CPB's decisions to be reviewed by the Commission. CPB was created as a mechanism which would enable the provision of federal financial assistance to public broadcasting. Congress had found that realization of public broadcasting's potential to serve the American public required federal funding to improve the quality, quantity and diversity of programming available to the local public television stations. At the same time, Congress sought to insure, to the extent possible, that the federal government did not control that programming—nor appear to control it. Thus, it provided for the creation of CPB as a nongovernmental, nonpartisan, nonprofit, private corporation, to insulate that programming from external political pressure arising from the system's funding. The House Report on the bill is clear:

> How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.
>
> Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit corporation . . . will provide the most effective insulation from Government control or influence over the expenditure of funds.[10]

Similarly, Senator Pastore commented during the Senate hearings on the bill:

> I intend to see that a full record is developed on this point and every possible safeguard written into the legislation necessary to assure complete freedom from any Federal Government interference over programming.[11]

Commission superintendence of CPB under the "objectivity and balance" provision of Section 396(g)(1)(A) is inconsistent with that goal. It will create the

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[10] *H.R. Rep. No. 572,* 90th Cong. 1st Sess. 15 (1967); *see also S. Rep. No. 222,* 90th Cong. 1st Sess. 4 (1967).

[11] *See Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 90th Cong. 1st Sess. 9 (1967). *See also* 113 Cong. Rec. 26384 (Remarks of Rep. Staggers).

very type of interference with the programming decisions of CPB which Congress sought to avoid.

Finally, the Petitioner's reliance on Section 399 to support a contrary result is misplaced.[12] Section 396 (g)(1)(A) deals with the Corporation while Section 399 deals with licensees. Since the Public Broadcasting Act was not intended to affect the Commission's regu-

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[12] Section 399 provides as follows:

"(a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

(b)(1) Except as provided in paragraph (2), each licensee which receives assistance under this part after the date of the enactment of this subsection shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed. Each such recording shall be retained for the sixty-day period beginning on the date on which the licensee broadcasts such program.

(2) The requirements of paragraph (1) shall not apply with respect to a licensee's broadcast of a program if an entity designated by the licensee retains an audio recording of each of the licensee's broadcasts of such a program for the period prescribed by paragraph (1).

(3) Each licensee and entity designated by a licensee under paragraph (2) which retains a recording under paragraph (1) or (2) shall, in the period during which such recording is required under such paragraph to be retained, make a copy of such recording available—

(A) to the Commission upon its request, and

(B) to any other person upon payment to the licensee or designated entity (as the case may be) of its reasonable cost of making such copy.

(4) The Commission shall by rule prescribe—

(A) the manner in which recordings required by this subsection shall be kept, and

(B) the conditions under which they shall be available to persons other than the Commission,

giving due regard to the goals of eliminating unnecessary expense and effort and minimizing administrative burdens."

latory authority over its licensees,[13] Commission enforcement of Section 399 with respect to its licensees is not inconsistent with the conclusion that its jurisdiction should not be extended to CPB. Moreover, the delegation of authority in Section 399(b) was added in 1973, P.L. 93-84, 8-6-73, 87 Stat. 219, subsequent to the passage of Section 398, and the delegation of that authority is of the type which is typically given to an administrative agency—to adopt administrative rules concerning the making available to the public of audio tapes. There is nothing in Section 399(b) or its legislative history to indicate that Congress intended, through its passage, to transform the system established by the 1967 Act and provide for general Commission oversight of CPB.

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[13] *Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 188, 221 (1967); *see also, e.g.*, 113 Cong. Rec. 26384 (Remarks of Rep. Staggers).

CONCLUSION

Petitioner AIM has demonstrated neither that the decision of the Court of Appeals presents an issue sufficiently important to be worthy of review by this Court nor that the decision is incorrect. Therefore, PBS prays that this Court deny certiorari in this proceeding.

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UNITED STATES OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT CORPORATION FOR PUBLIC BROADCASTING IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENT CORPORATION FOR PUBLIC BROADCASTING IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion and Order of the Federal Communications Commission is reported at 43 F.C.C. 2d 851 (1973). The opinion of the court of appeals is reported at 521 F.2d 288 (D.C. Cir. 1975).

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1975. The petition for a writ of certiorari was filed on January 10, 1976. On February 2, 1976, the Clerk issued an order extending the time for

filing responses to the petition to March 2, 1976. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, pursuant to Section 396(g)(1)(A) of the Communications Act, the Federal Communications Commission has jurisdiction to require the Corporation for Public Broadcasting to maintain "objectivity and balance" in its programs, even though Section 398 expressly provides that nothing contained in Section 396 shall be deemed to authorize any agency of the United States to exercise "any direction, supervision, or control" over the Corporation.

STATUTES INVOLVED

47 U.S.C. § 396(g)(1)(A):

> In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—
>
> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

47 U.S.C. § 398:

> Nothing contained in sections 390-399 of this title shall be deemed (1) to amend any other provision of, or requirement under this chapter; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any discretion, supervision, or control over educational television broadcasting, or over the Corporation or any

> of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

STATEMENT

Petitioner filed complaints with the Federal Communications Commission (FCC) against the Public Broadcasting Service (PBS) alleging, *inter alia,* that two programs produced with the financial assistance of the Corporation for Public Broadcasting (CPB) and distributed by PBS to non-commercial educational television stations throughout the United States violated Section 396(g)(1)(A) of the Communications Act of 1934, as amended.[1] That provision authorizes CPB to:

> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.

In its initial consideration of the question whether the two programs contravened the objectivity and balance language of Section 396(g)(1)(A), the FCC expressed doubt that it had jurisdiction to require adherence to this standard (39 F.C.C. 2d at 420 n.1). It pointed to Section 398 of the Communications Act which provides that nothing in Sections 390-399 shall be construed "to authorize any department, agency, officer, or employee of the United States to exercise any

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[1] The complaints alleged also that the two programs violated the Fairness Doctrine. The FCC rejected this claim, and petitioner did not press it in the court of appeals.

direction, supervision or control over educational television broadcasting, or over the Corporation [for Public Broadcasting] * * * ." It invited petitioner and other interested parties to file briefs on the issue.

After full consideration, the FCC held that it lacked jurisdiction to enforce the objectivity and balance language of Section 396(g)(1)(A). In so holding, it reasoned that Congress' primary purpose in enacting Section 398 was to keep CPB free from government control, and that it would not be warranted in attempting to oversee the Corporation's activities. It pointed out further that its decision did not free public broadcasting from Fairness Doctrine supervision; and that individual noncommercial licensees were subject to the Fairness Doctrine enforced by the FCC. The FCC stated that a holding that the objectivity and balance language of Section 396(g)(1)(A) was enforceable would simply add another layer of fairness supervision.

Petitioner appealed, and CPB was permitted to intervene.[2] The court of appeals affirmed, following the FCC's reasoning, and concluding (521 F.2d at 297) that Section 396(g)(1)(A) "is not a substantive standard, legally enforceable by agency or courts," but should be taken "as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire."

---

[2] The court also permitted the following parties to intervene: The Public Broadcasting Service, The University of Maine, Lehigh Valley Educational Television Corporation, Northeastern Pennsylvania Educational Television Association, Connecticut Educational Television Corporation, State of Wisconsin—Educational Communications Board, The Board of Regents of the University of Wisconsin System, The Nebraska Educational Television Commission, The Virginia Public Telecommunications Council and Educational Broadcasting Corporation.

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. The issue raised here is one of first impression. It does not involve a matter of broadcast regulation, but rather the scope of the FCC's jurisdiction over CPB, an entity which by statute (Section 396(g)(3) of the Communications Act) is forbidden to own or operate "any television or radio broadcast station, system, or network, community antenna television system, or interconnection or program facility." Thus, petitioner's claim of conflict (Pet. 15) with principles of broadcast regulation established by this Court is wide of the mark.

Involving as they do principles of broadcast regulation, the cases upon which petitioner relies for conflict arise in wholly different factual contexts and, indeed, involve statutory provisions different from those in issue here. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), concerned the proper FCC procedure to determine the award of a construction permit to competing applicants for a broadcast station. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court, after noting that CATV systems were engaged in interstate commerce, upheld FCC jurisdiction over CATV as reasonably ancillary to the performance of its responsibilities for regulating television broadcasting. And in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 369 (1969), the Court affirmed the FCC's authority to enforce the Fairness Doctrine against broadcast licensees. None of these decisions conflicts in principle or otherwise with the decision below, and none bears materially on the outcome of the instant case.

2. The interpretation by the court of appeals of the relevant statutory provisions likewise affords no basis for review by this Court. Indeed, the court of appeals and the FCC reached the only conclusion they could have reached, given the explicit Congressional command that nothing in Sections 390-399 of the Communications Act should be construed to authorize any agency to exercise "any direction, supervision, or control" over educational television broadcasting or CPB. As the court of appeals explained (521 F.2d at 292), "[s]ince the FCC is obviously an 'agency * * * of the United States' and since any enforcement of § 396(g)(1)(A) would necessarily entail 'supervision' of the Corporation, the plain words of subsection (2) [of Section 398] preclude FCC jurisdiction."

This conclusion, moreover, is fully consistent with the legislative history of the statute which, as both opinions below make clear, amply demonstrates Congress' overriding concern (H.R. Rep. No. 572, 90th Cong., 1st Sess. 19 (1967)) "to remove the programming activity from governmental supervision." In the words of Congressman Staggers, the chief House spokesman for the public broadcasting legislation (113 Cong. Rec. 26384)), "No one—the administration, the Committee, the witnesses—wanted any hint of Federal control of broadcast programs to be permitted." As for petitioner's claim (Pet. 8) that the court of appeals failed to quote from the single most relevant portion of the legislative history, the Conference Report relating to Section 396(g)(1)(A), it is enough to point out that there is not a word in the passage relied upon which even remotely suggests that Congress intended the FCC or any other government agency to enforce the objectivity and balance language.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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